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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 226

DELVAILLE H. THEARD,

Petitioner,

versus

LOUISIANA STATE BAR ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

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Petitioner prays that a writ of certiorari issue herein to review a judgment of the Supreme Court of Louisiana.

OPINIONS BELOW.

This case was tried below by the Supreme Court of Louisiana in the exercise of its original jurisdiction, as provided by the State Constitution *(Louisiana Constitution*, Art. 7, Section 10, paragraph 1). The opinion of the Supreme Court sought to be reviewed is reported in

Southern Reporter, Second Series, Advance Sheets of June 10, 1954 (72 So. (2d) No. 3) page 310, *Louisiana State Bar Association v. Theard* (R. 13, 73). A previous opinion by the Supreme Court of Louisiana, on preliminary pleas and exceptions in the same case, is reported, under the same title, in 222 La. 328, 62 So. (2d) 501 (R. 27, 44). These two opinions are appended to the present petition, as Exhibit "A" (R. 13) and "B" (R. 27), respectively.

STATEMENT OF GROUNDS FOR JURISDICTION.

The opinion and decree of the Supreme Court of Louisiana in this case was rendered and entered on March 22, 1954. Rehearing was denied on April 26, 1954. The petitioner by said decree was deprived of his property without due process of law, in violation of Section 1 of the 14th Amendment to the Constitution of the United States. The jurisdiction of this Court is invoked under *Title* 28, *U. S. Code, Sect.* 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

While the privilege of being received as a member of the legal profession is not a matter of right but depends on the judgment and discretion of the licensing authorities of the State, the license once granted constitutes property, of which under the Fourteenth Amendment the lawyer cannot be deprived for any arbitrary or insubstantial reason.

Can a lawyer who, during a complete mental breakdown in 1934 and 1935 committed an act for which he was not legally responsible and the moral import of which he was unable to appreciate, be disbarred in 1954, when

he has fully recovered physically and mentally, has again entered normally on the practice of his profession, and has appeared and acted as counsel for some years and on countless occasions in the courts, without the doing of one single act subject to the slightest criticism or reproach?

The right to exercise any calling permitted by law, although perhaps intangible, unquestionably constitutes property, and can only be taken away and denied constitutionally on account of sound and valid justification. Implicit in the grant of discretion to a licensing authority is the qualification that it must not exercise its supervisory powers on arbitrary, whimsical or irrational considerations.

Further, a petition for disbarment, instituted nearly eighteen years after notorious and wide-spread publicity of the act or acts complained of, lacks due process. *People v Allison*, 38 Ill. 151; *People v. Coleman*, 210 Ill. 79, 71 N. E. 693;*In the Matter of the Disbarment of C. E. Elliott*, 73 Kansas 151, 84 Pac. 750; *In re Adriaans*, 28 App. D. C. 515; *People v. Tanquery*, 48 Colo. 122, 109 Pac. 260.

Finally and particularly, especially in a jurisdiction where as in Louisiana the power to disbar is not inherent in the Courts but is strictly statutory and can be grounded only on misconduct, there must be justification, reasonable and sufficient, for disbarment. In the present case, the disbarment of petitioner, as clearly appears from the decision of the Supreme Court (R. 19-20, 78-80) was based exclusively on the ground of illness eighteen years previous. The decision, expressly excluding all consideration of personal fault, and indiscriminately classifying innocent

with knowing activity, was clearly not based on any ground sufficient or authorized by law and is lacking in due process.

STATUTE INVOLVED.

In Louisiana the right to disbar is vested in the exclusive original jurisdiction of the State Supreme Court. The Court's jurisdiction to disbar is limited to cases involving misconduct,—a wilful act.

Illness, especially when it occurred eighteen years previously and the lawyer has since that time fully recovered his health, physical and mental, is not a cause for disbarment.

Louisiana Constitution, Art. 7, Sect. 10, paragraph 1:

> "It (the Supreme Court) shall have exclusive original jurisdiction in all cases involving misconduct of members of the bar, with power to suspend or disbar under such rules as may be adopted by the Court, and in suits for removal of judges of courts of record from office as elsewhere provided in this Constitution".

STATEMENT OF THE CASE.

After some twenty-six years of the due and honorable practice of law, including sixteen years as part-time professor of Civil law in the Tulane Law School at New Orleans, petitioner about the year 1934 or 1935 suffered a serious mental breakdown resulting from overwork, and which necessitated in 1936 his civil interdiction and his removal to a mental hospital where he remained

under treatment constantly until 1943, being then moved to the State Asylum for the Insane, from which he was released as cured and without psychosis, in 1944.

In 1948, his civil interdiction having been judicially removed—the Court holding that he was completely restored to health and able to manage his own affairs—petitioner, who had and has never been convicted of any crime, resumed the practice of law and, since that time and up to the refusal of the rehearing in the disbarment suit on April 26, 1954, was very active in the *nisi prius* and appellate courts— having argued during these six years (from 1948 to 1954) not less than thirty-seven matters before the Supreme Court of Louisiana and the intermediate court of appeal for Orleans Parish. See list of these cases, attached to the present petition as Exhibit "C". (R. 35).

In June, 1952, the Louisiana State Bar Association instituted the present disbarment suit against petitioner. It admittedly found no fault with his current professional conduct and activities since his resumption of practice in 1948, but based its complaint exclusively on acts of petitioner committed during his period of insanity approximately eighteen years previous to the institution of the complaint.

The State Court, although finding that petitioner was insane in 1935 and committed the act complained of while in that condition, held that, despite petitioner's complete restoration to health since 1948, he must be disbarred in 1954, for the act committed nineteen years previously, while insane. *Louisiana State Bar Association v. Theard*,

72 So. (2d) 310 (Southern Reporter Advance Sheets, June 10, 1954, No. 3). (R. 13, 73).

FEDERAL QUESTION.

The federal question was raised four times in the present case. First, on application for rehearing from the overruling of the exceptions filed at the outset of the action by defendant (R. 51); this application for rehearing was refused without written reasons (R. 53). Second, in petitioner's answer (R. 54). Third, by special plea (R.58). In its opinion (R. 24-25, 78-80), the question was decided by the State Court against petitioner. Fourth, in petitioner's application for rehearing (R. 86); rehearing denied without written reasons (R. 93).

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT.

If petitioner's disbarment were based on misconduct, intentional and reprehensible, or for any conscious act involving moral turpitude, although committed long years ago, this might be justified despite the ruling of many courts refusing to entertain such stale action.

But, as clearly appears from mere reading of its reasons for judgment, the State Court disbarred petitioner for an act committed many years before and while he was the victim of a mental breakdown, utterly bereft of reason and unable to distinguish between right and wrong.

This is especially unusual: 1) because, as shown, the Louisiana Constitution limits the Court's jurisdiction to disbar to acts of misconduct; and 2) the State Court

has already decided, in respect to the status of petitioner, that it "occurred by reason of an unfortunate circumstance over which he had no control", and not "through some intentional and deliberate act on his part". *State v. Theard*, 212 La. 1022, at p. 1031, 34 So. (2d) 248, at p. 251.

In *Robert M. Wieman, et al., v. Paul W. Updegraff, et al.*, 344 U. S. 183 (97 L. Ed. 216, 73 Sup. Crt. 215), the Court was brought to the question, "whether the due process clause permits a State, in attempting to bar disloyal individuals from its employ, to exclude persons . . . regardless of their knowledge",

The Court through Justice Clark (344 U. S. at p. 190) said:

> "There can be no dispute about the consequence visited upon a person excluded from public employment on loyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy . . . (p. 191) indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power . . . (p. 192). It is sufficient to say that constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary and discriminatory".

This holding is particularly apt in this case, in which, putting aside all other considerations (see the last paragraph of the decision, (R. 25, 84), the Louisiana Court visited disbarment upon petitioner for an act committed whilst he was insane and therefore irresponsible, and upon

a doctrine that makes no distinction between innocent and knowing activity.

That there must be a substantial reason for a decree of professional suspension or disbarment, and that such a decree cannot be considered if the act lacks the element of wrongdoing and is insufficient to serve as a basis for judicial condemnation, is strongly emphasized in the dissenting opinions of Justices Black, Frankfurter and Douglas, in *Dr. Barsky v. Board of Regents of the University of the State of New York*, 347 U.S. 442, 98 L. Ed. (Advance p. 545), 74 S. Crt. Rep. 650.

Justice Black (with Justice Douglas concurring) said (p. 459):

> "... the right to practice is ... a very precious part of the liberty of an individual physician or surgeon. It may mean more than any property. Such a right is protected from arbitrary infringement by our Constitution, which forbids any State to deprive a person of liberty or property without due process of law ... (p. 463). The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails ... Such arbitrary power amounts to a denial of equal protection of the law within the meaning of the Fourteenth Amendment ..."

Justice Frankfurter (p. 470) said:

> "It is one thing to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, how-

ever, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession. . . (p. 471). The limitation against arbitrary action restricts the power of a State 'no matter by what organ it acts'."

And Justice Douglas (with Justice Black concurring), (p. 472) said:

"The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property . . . The great values of freedom are the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellowman . . . The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain rights are protected, that certain things shall not be done. And so, the question here is not what government must give, but rather what it may not take away. The Bill of Rights prevents a person from being denied employment who . . . is wholly innocent of any unlawful purposes or activity. Citing Wieman v. Updegraff, 344 U. S. 183 . . . (p. 474). In this case it is admitted that Dr. Barsky's 'crime' consisted of no more than a justifiable mistake concerning his constitutional rights".

(Petitioner shows that his disbarment(according to the expressed limitation of the decision of the Louisiana Supreme Court, (R. 20, 25) was for the commission of an

act while insane, and for which he was totally irresponsible).

> "Such conduct", resumes Justice Douglas (p. 474), "is no constitutional ground for taking away a man's right to work . . . Neither the security of the State nor the well-being of her citizens justifies this infringement of fundamental rights".

Petitioner, as no one can deny, has completely recovered from his illness. With great industry he has since 1948 honorably practiced his profession (his sole means of living). And, as quoted by the State Court at page 4 of its opinion (R. 16, 76), "without any complaints levelled at his conduct."

The list of cases argued by petitioner in the Louisiana Supreme Court and the Court of Appeal for the Parish of Orleans since 1948 (R. 35) reflects his capacity to render service in many types of litigation, and demonstrates his complete mental restoration. Trial work both at *nisi prius* and on appeal is truly taxing and can be performed, regularly and constantly over a period of years, only by a person of good physique, sound mind and stable nerves.

The general proposition is aptly stated in *Frank M. Dent v. The State of West Virginia*, 129 U. S. 114, 32 L. Ed. 623, 9 Sup. Crt. Rep. 231, where this Court said:

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and conditions. This right may in many

respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken . . . As we have said on more than one occasion, it may be difficult, if not impossible to give to the terms "due process of law" a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden . . . The great purpose of the requirement is to exclude exerything that is arbitrary and capricious in legislation affecting the rights of the citizen . . . The cases of Cummings v. Missouri, 71 U. S., 4 Wall. 277 (18 L. Ed. 356) and Ex parte Garland, 71 U. S., 4 Wall. 333 (18 L. Ed. 366), upon which much reliance is placed, do not, in our judgment, support the contention of the plaintiff in error . . . They only determine that one who is in the enjoyment of a right to preach and teach the Christian religion as a priest of a regular church, and one who has been admitted to practice the profession of the law, cannot be deprived of the right to continue in the exercise of their respective professions, by the exaction from them of an oath as to their past conduct, respecting matters which have no connection with such professions . . . The

> Constitution of Missouri and the Act of Congress in question in those cases were designed to deprive parties of their right to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions."

Petitioner's interest, or as it is called by the Supreme Court in the discussion of the matter just quoted, the estate acquired by him as a lawyer schooled and experienced in his profession—an acquisition necessarily achieved only after years of study, application and experience—is obviously of substantial value to him, as stated, and "cannot be arbitrarily taken from (him), any more than (his) real or personal property can be thus taken". Such estate possessed by a lawyer in active practice and happily restored to the full enjoyment of his physical and mental attributes and faculties, cannot be constitutionally taken from him for the sole reason that, eighteen years or so before, as the result of a then existing mental infirmity and seizure, he committed an act for which, due to his illness, he was at that time totally irresponsible.

For the foregoing reasons, petitioner prays that his petition for a certiorari to the Honorable the Supreme Court of Louisiana, be granted.

Respectfully submitted,

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EXHIBIT "A".

No. 40, 891

SUPREME COURT OF LOUISIANA

Louisiana State Bar Association

v.

Theard

Decided March 22, 1954; rehearing denied April 26, 1954.

Hamiter, Justice. The instant consideration of this disbarment proceeding, instituted by the Committee on Professional Ethics and Grievances of the Louisiana State Bar Association against Delvaille H. Theard, occurs on oppositions to the Commissioner's Report. Initially, it is well to briefly review earlier phases of the matter.

Under date of February 2, 1950, the Committee gave notice in writing to respondent that it was undertaking an investigation of certain conduct on his part as a member of the Bar of Louisiana, the communication detailing and specifying some eleven acts of alleged misconduct and further setting forth that he would be afforded the opportunity of being heard and of defending himself before the Committee.

The contemplated hearing was held in the City of New Orleans on June 5 and 6, 1952, at which respondent was present and represented by counsel of his choice; and, by stipulation, it was restricted to a consideration or in-

vestigation of specification No. 1 as listed in the above mentioned communication. The charge therein made was that on January 2, 1935, while engaged in the active practice of law in the City of New Orleans, respondent forged the signatures of Olga Wexler and Alys Senn to a promissory note for $20,000; and that subsequently, having paraphed it to appear as an authentic mortgage note, he sold this forged instrument for a valuable consideration to Mrs. Annie W. Forsyth, widow of Julius Forsyth.

In opening the hearing the Committee offered proof of the charged forgery, and of respondent having received from a representative of Mrs. Forsyth the sum of $12,601.25 for the note. The respondent instead of attempting to contradict such proof, admitted that the signatures on the note were in his handwriting; and, further, he sought to establish (by written reports and by his own testimony and that of others) the existence at the time of a mental illness or form of insanity which rendered him incapable of wilfully committing the forery and uttering. For example, under examination by his own counsel, he testified in part:

"Q. Mr. Theard, the Committee is investigating, as you know, a matter which appertains to a note dated January 2, 1935, which has been offered in evidence as 'Committee's Exhibit 1.' Will you look at that note and tell me what you remember of its execution (handing note to witness).

A. You showed me that note in your office, Mr. Rivet. Frankly, I don't remember anything about it.

"Q. You won't deny that those signatures on that note are in your handwriting?

A. No, I told you so, and you made the admission. I recognize my handwriting in the signatures and the statement of the reduction of the payment of interest. I recognize that that is my handwriting.

"Q. Do you remember selling the original of that note to anybody?

A. No."

On completion of the investigation, the Committee petitioned this court for the disbarment of respondent, it alleging his guilt of the charge set forth in Specification No. 1 as was proved at the hearing held June 5 and 6, 1952.

To the petition respondent tendered several exceptions. Particularly, in one he challenged the right of the Committee to maintain the action in view of his mental illness (as assertedly disclosed by evidence adduced at the Committee hearing) at the time of the misconduct; and in another he pleaded prescription, laches, and estoppel in bar of the disbarment. All exceptions, after having been thoroughly considered, were overruled by us. See 222 La. 328, 62 So. (2d) 501.

In an application for rehearing, the above specifically described exceptions were reurged and, for the first time, respondent further contended that the "taking away of a lawyer's right to practice after restoration to health, for acts committed during a mental infirmity precluding conscious guilt, would be inimical to Amendment

XIV of the United States Constitution, which prohibits the deprivation of a valuable right without due process of law". The application for a rehearing, calling due consideration, was denied.

Thereafter, answer was filed, it containing a general denial of the factual allegations on which the disbarment is sought and, additionally, the following affirmative averments:

"Further answering, respondent says that the act charged as misconduct against respondent occurred nearly eighteen years ago; that at that time respondent was suffering from a mental illness which rendered him incapable of guilty or wilful conduct and deprived him of the ability to distinguish right and wrong; that he carries no recollection of the act charged against him; that at this late date he is without records and other means of defending himself; that numerous witnesses best acquainted with his condition in January of 1935, and theretofore, have died; that a previous Committee considered and had the opportunity to investigate respondent's conduct; that the compulsion to defend himself against said stale occurrence operates to his prejudice, is essentially unjust, and results in depriving respondent of the procedural due process guaranteed by Section 2 of Article 1 of the State Constitution and the Fourteenth Amendment to the Constitution of the United States.

"Since April 1948, respondent has resumed the active practice of law without any complaint levelled at his conduct.

"Respondent finally says that he never at any time consciously violated any law relating to

the professional conduct of lawyers and to the practice of law, nor has he ever wilfully violated any rule of professional ethics".

Later, respondent submitted special pleas of prescription and unconstitutionality which merely reiterated and amplified similar pleas theretofore tendered.

On proper motion, after issue had been joined, Mr. John Pat Little, an attorney at law who had engaged in active practice for a period of not less than ten years, was appointed Commissioner to take the evidence in chambers and to report to this court his findings of fact and conclusions of law. Pursuant to the appointment he held a hearing on March 9, 1953, in which the greater part of the evidence offered was that introduced in the proceeding conducted by the Committee on June 5 and 6, 1952. Only three witnesses testified before the Commissioner. One was produced by the Committee in further proof of the forgery and uttering and to show that respondent knowingly committed the unlawful acts. The remaining two were called by respondent merely to identify certain records.

After termination of the hearing, the Commissioner prepared and filed a lengthy and well considered written report in which he analyzed the evidence, set forth his findings of fact and discussed and announced his conclusions of law. In summarizing the evidence he commented:

"The commission of the wrongful acts by the respondent is established beyond any doubt; it is even conceded in the respondent's brief to the Com-

missioner. No evidence was produced by counsel for the Committee, nor even offered, to rebut the alleged mental condition of the respondent. It must then, from the record, be held that the respondent was suffering under an exceedingly abnormal mental condition, some degree of insanity".

With respect to the law determined to be applicable, as well as to his conclusions therefrom, the Commissioner observed in part:

"It is the gist of the respondent's argument that being without his mental faculties he was without volition or control over his actions, and, therefore, cannot be guilty of misconduct . . . This feature of the case rests squarely upon the question of whether or not the defense of insanity is sufficient to prevent this Court from disbarring a lawyer who has been guilty of having forged and uttered a promissory note . . .

"* * *

"Having in mind the Court's decision on the exceptions found in 62 So. (2d) 501 and particularly the portion thereof relating to respondent's exceptions based upon insanity on page 503, the Commissioner is constrained to find that the law as expressed in that opinion does not relieve the respondent from the effects of his actions . . .

"In conclusion, the Commissioner finds that the respondent Delvaille H. Theard is guilty as charged of forging and uttering a certain promissory note, dated January 2, 1935, in face amount

of $20,000, purporting to bear the signatures of Olga Wexler and Alys Senn.

"Commissioner further finds that, as a matter of law, the abnormal mental condition of the respondent at the time of such forgery and utterance does not constitute a defense to disbarment proceeding therefor.

"Accordingly, the Commissioner has no alternative but to recommend to the Supreme Court of Louisiana that a decree of disbarment be entered herein; and that the Court order the name of Delvaille H. Theard be stricken from the roll of attorneys permitted to practice before that Court".

Now, in opposing the Commissioner's report, respondent first assigns error to the conclusion that the abnormal metal condition existing at the time of the commission of the wrongful acts does not constitute a defense to disbarment.

Influencing that conclusion, as the Commissioner points out, were certain pronouncements of this Court made in connection with our consideration of respondent's tendered and overruled exceptions to the petition, they having been as follows. . . . . "we do not view the mental deficiency of a lawyer at the time of his misconduct to be a valid defense to his disbarment. Strangely enough, counsel for respondent apparently takes it for granted that, because evidence has been produced indicating that respondent was probably suffering from amnesia and other mental deficiencies at the time of his misdeeds, his insanity

(which we will concede for purposes of this discussion) operates as a complete bar to this proceeding.

"We think that counsel is mistaken in his assumption. . . . . One of the qualities requisite for admission to the bar is that the applicant be of good moral character. When a lawyer has committed peculations, forgeries and breaches of trust, he violates the oath he has taken to demean himself honestly in his practice, and the good character he possessed no longer exists. And it will not do for respondent to say that he was suffering from a mental aberration or amnesia depriving him of the ability to distinguish between right and wrong. In disbarment, unlike criminal prosecution or a civil suit for recovery of money based on an offense or *quasi* offense, consideration of the interest and safety of the public is of the utmost importance for, whereas it may not be humane to punish by confinement to prison one who labored under the inability to understand the nature of his wrongful acts, it is quite another matter to permit such a person to continue as an officer of the court and to pursue the privilege of engaging in the honoroble profession of counsellor-at-law when he, by his misconduct, has exhibited a lack of integrity and common honesty. *And in our opinion it matters not whether the dishonest conduct stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent.*" (Italics ours.)

Respondent's counsel now argues that the quoted pronouncements and rulings relating to the exception to the petition were merely interlocutory; that they did not constitute the "law of the case"; and that, consequently, they were not binding on the Commissioner in his consi-

deration of the matter. We are unable to agree; and the three cases cited by counsel do not sustain the argument, they being *Levy v. Wise*, 15 La. Ann. 38; *Culverhouse v. Marx*, 38 La. Ann. 667 and *Cusachs v. Dugue*, 113 La. 261, 36 So. 960. In each of those cases the Court considered the question of whether a district judge has the right to revise an interlocutory decree, when the matter affected by it is brought up anew in proper form, and held that he is so empowered. With respect to an appellate court the doctrine prevailing is that its final ruling on an exception is the "law of the case" as to the point covered. See *Cusachs v. Dugue, supra; Jacob v. Rochel*, 164 La. 114, 113 So. 786; *State ex rel Navo v. Baynard*, 179 La. 785, 155 So. 225; *City of Gretna v. Aetna Life Insurance Company* 207 La. 1085, 22 So. (2d) 658.

But if the doctrine were otherwise, we know of no good reason for changing our previous ruling. It appears to be logically sound; it is supported by competent authority; and no holdings to the contrary have been brought to our attention.

Under a general heading entitled "A Commissioner's report should be rejected which does not include findings of all pertinent facts and does not conclude all issues of law", respondent lists in his opposition three complaints which we shall consider in reverse order. It is said: "The Commissioner made no findings of fact on evidence tendered to prove that all of respondent's records had been taken out of his custody under writs issued long years since". If the issue in this proceeding were whether or not the respondent had committed the wrongful acts with which he is charged, and the missing records were material

thereto, the complaints would be justified. But he has admitted the forgery offense and, consequently, the matter of the loss of some of his records seems irrelevant and unimportant here.

Next he complains: "The Commissioner expresses no conclusion on the legal point that it is essentialy unjust to require respondent to defend himself against charges brought more than fourteen years after occurrence of the acts involved in the accusation, and where such acts are not corroborative of recent conduct". The same legal point was advanced in this court on the previous hearing of the exceptions to the petition, particularly in connection with one in which respondent had pleaded prescription and laches.

There we observed and ruled: "The fifth exception of respondent is that of precription, laches and estoppel. It is asserted that, since the acts complained of occurred more than 17 years ago, the offense is so stale that it would be inequitable and unjust to permit the prosecution of the proceeding and, further, that respondent would be highly prejudiced in defending the suit after the passing of such a great length of time.

"The exception cannot be sustained. Our law of prescription is purely statutory and the fact that a long time has elapsed between the commission of the acts and the bringing of the charges does not, of itself, provide a just ground for dismissing the suit. Indeed, it appears that respondent was confined to an asylum for several years, and that he was under a judgment of interdiction from June 1941 until May 7, 1948, during which time the

Committee was unable to act. If respondent has been prejudiced by the delay, this is a matter which can be shown on the merits of the case".

Supplementary to the quoted observations, it may be pointed out that in 1937 a Bar Committee sought to investigate complaints of misconduct on the part of respondent, but action thereon was deferred indefinitely at the request of his uncle who stated that the nephew was then in the insane asylum and interdiction proceedings were pending (they were instituted August 4, 1936).

Although the exception of prescription and laches was overruled, to which ruling we adhere for we are convinced that it was correct, respondent was reserved the right to show on the merits that he was unjustly prejudiced by the lapse of time. But there is nothing in the record before us from which we can conclude that the delay resulted in prejudice to him in the preparation of a defense.

Finally, respondent asserts: "The Commissioner disposes of respondent's constitutional pleas by erroneously presuming that they have already been decided adversely to respondent". And in his report the Commissioner states: "The additional plea of unconstitutionality seeks to invoke the 14th Amendment to the United States constitution as a defense. It is claimed that the disbarment of the respondent herein would be a deprivation of his substantive rights in violation of that Amendment". 'This plea is substantially the same as that found in Article IV of respondent's 'Answer with Reservation of Exceptions' filed herein and also Article IV of respondent's "Petition for Reconsideration of Exceptions" ". The Court had that

answer and that petition before it when a rehearing was denied on January 12, 1953. Your Commissioner must presume that the Court has already considered the constitutional point thus raised and has decided it adversely to the respondent".

The mentioned constitutional pleas were not directly passed upon by us heretofore for the reason that they were offered for the first time in the application for a rehearing on the exceptions to the petition. However, they appear to be without merit. The pleas, quoted above and as we appreciate them, assume that a license to practice law is a natural or constitutionally granted right. But the assumption is erroneous. As said in *7 C. J. S., verbo* Attorney and Client, Sect. 4 (b): "The right to practice law is not a natural or constitutional right, nor an absolute right or a right de jure, but is a privilege or franchise. The right to practice law is not 'property', nor in any sense a 'Contract', nor a privilege or immunity', within the constitutional meaning of those terms. It cannot be assigned or inherited, but must be earned by hard study and good conduct". See also *5 American Jurisprudence, verbo* Attorney at Law, Section 14; *State v. Rosborough*, 152 La. 945, 94 So. 858; Ex parte Steckler, 179 La. 410, 154 So. 41; *In re Mundy*, 202 La. 41, 11 So. (2d) 398; *Meunier v. Bernich*, La. App. 170 So. 567.

In the brief of respondent's counsel it is said "that the right to practice law, once granted, does fall under constitutional protection", as is made clear by decisions of the United States Supreme Court in Ex parte Garland, 4 Wall, 333, 18 L. Ed. 366, and Ex parte Robinson, 19 Wall. 505. 22 L. Ed. 205. What those decisions stand for as

we read them, is shown by the following extracts taken from the latter: ". . . Before a judgment disbarring an attorney is rendered, he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense. This is a rule of natural justice and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property . . .".

In the quoted extract the court is not holding that the practice of the profession is a natural, constitutional, or property right. Rather, it is announcing that natural justice requires that an attorney be notified and heard before he is deprived of the privilege of practicing his profession. We agree thoroughly with this principle, and we believe that the stated requirement has been fully met in the instant proceeding.

Petitioner herein (the above named Committee) excepts to that part of the Commissioner's Report which holds that respondent "was suffering under an exceedingly abnormal condition, some degree of insanity". It alleges in its exceptions "that, on the contrary, the evidence abundantly shows that he deliberately and consciously, and with malice aforethought, attempted to simulate and feign, and did so simulate and feign, the genuine signature of the alleged makers of the mortgage note, which he now admits was forgery". However, in view of the conclusion reached and hereinabove declared, we need not determine the Committee's exception.

For the reasons assigned it is ordered, adjudged and decreed that the name of Delvaille H. Theard, respondent herein, be stricken from the roll of attorneys and his license to practice law in Louisiana be, and the same is hereby, cancelled. Respondent shall pay costs of this proceeding.

EXHIBIT "B".

Louisiana State Bar Association.

v.

Theard

SUPREME COURT OF LOUISIANA

Decided December 15, 1952

Rehearing denied January 12, 1953.

McCaleb, Justice. The Louisiana State Bar Association, appearing through the Committee on Professional Ethics and Grievances, instituted this proceeding seeking the disbarment of Delvaille H. Theard for professional misconduct. It is charged, in substance, that, on January 2, 1935, while engaged in the active practice of law in the city of New Orleans, respondent forged, with intent to defraud, the signatures of Olga Wexler and Alys Senn to a promissory note for $20,000; that he thereafter transferred the note for valuable consideration to a Mrs. Anna W. Forsyth and that, in furtherance on (sic) his unlawful acts, he paraphed the note in his capacity as a Notary Public in order to make it appear that it was an authentic mortgage note. It is averred that, in conformity with the rules of this Court, the Committee on Professional Ethics and Grievances has conducted an investigation; that a hearing was had on the charges in the city of New Orleans on June 5 and 6, 1952, at which time respondent admitted that he had apparently forged the signatures of Olga Wexler and Alys Senn and had uttered the forged

instrument but that he had no recollection whatever of the transaction nor with respect to the disposition of the money he obtained from Mrs. Forsyth.

It is further alleged that, after hearing the evidence, the Committee was of the opinion that respondent had been guilty of a violation of the laws of this state relating to professional misconduct and that he had wilfully transgressed the rules of professional ethics to such an extent that he was morally unfit to continue the practice of law. Wherefore the suit.

In due course, respondent appeared and excepted to the petition on several grounds. These exceptions have been argued and are presently submitted for our decision.

The first exception assails the capacity, authority and power of the Louisiana State Bar Association to institute the action. It is based on the idea that the Association, a non-trading corporation organized under Act 254 of 1914, LSA-R.S. 12:101, cannot appear through a Committee on Professional Ethics and Grievances but only by authority of its Board of Governors.

There is no merit in the point. By Section 11 of Article XIII of the Articles of Incorporation of the Association, it is specifically provided that all suits for disbarment "shall be brought in the name of the Louisiana State Bar Association. . ." and Section 4 of said Article makes it the duty of the Committee on Professional Ethics and Grievances to institute the suit. These are the rules of this Court, see Rule XVII. Hence, no special authority from the Board of Governors is essential to enable the appearance of the Association as complainant.

The second exception is predicated upon a similar contention, *i. e.* that the petition cannot stand because it is not signed by an officer of the Association. The answer is that this court, under its rulemaking power, has ordained that the suit be filed in the name of the Association by the Committee on Professional Ethics and Grievances. No other authority is required.

The third and fourth exceptions of respondent may be considered together. They are exceptions of no right or cause of action and to the jurisdiction of the court based on the single proposition that, since respondent has adduced proof at the hearing (which was held in accordance with Sections 3 and 4 of Article XIII of the Articles of Incorporation of the Louisiana State Bar Association) [1] showing that he was affected with a mental illness at the time of his misconduct, the proceedings should be summarily dismissed.

The contention does not impress us. It is plain fallacy, insofar as it is directed against our jurisdiction, as Section 10 of Article 7 of the Constitution vests the court with exclusive original jurisdiction". . . in all disbarment cases involving misconduct of members of the bar. . .". Respondent is charged with misconduct and his alleged mental illness cannot effect an ouster of the power of the court to hear the case.

The exception of no right or cause of action is addressed to the asserted lack of probable cause on the part of the Committee in filing the proceeding in view of respondent's showing of insanity at the time of the commission

(1) See In re Armstrong, 205 La. 67, 16 So. (2d) 908.

of his misdeeds. But the mere fact that respondent offered the sole defense of insanity at the hearing affords no reason for this court to deduce that the committee was without probable cause or that the petition does not state a right or cause of action. On the contrary, even if insanity at the time of the misconduct could be regarded as a legal ground for denying disbarment, we doubt that it can be pleaded on an exception of no cause of action, notwithstanding the evidence in support of the plea has been offered under a so-called exception of no right of action. See *Duplain v. Wiltz*, La. App. 174 So. 652 and cases there cited. Manifestly, insanity pleaded in ordinary civil actions as a bar to legal responsibility is a matter of defense, triable only on the merits, so that the plaintiff is afforded an opportunity to rebut the evidence tendered in support of the plea.

But, be this as it may, we do not view the mental deficiency of a lawyer at the time of his misconduct to be valid defense to his disbarment. Strangely enough, counsel for respondent apparently takes it for granted that, because evidence has been produced indicating that respondent was probably suffering from amnesia and other mental deficiencies at the time of his misdeeds [2] his insanity (which we will concede for purposes of this discussion) operates as a complete bar to this proceeding.

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(2) Incidentally, the peculations involved thousands of dollars belonging to his clients and others extending over a considerable period of time. In the petition, the charge has been limited to a single instance of forgery and uttering. However, counsel for respondent introduced in evidence Newspaper clippings and other documents relative to the public scandal and agitation attendant to the discovery of respondent's embezzlements, forgeries and other breaches of trust, his arrest and subsequent incarceration in a sanitarium for mental diseases where he remained for a long time.

We think that counsel is mistaken in his assumption. While mental defects, rendering an offender of the law incapable of distinguishing between right and wrong exempt him from criminal responsibility LSA-R.S. 14:14, or even may excuse him from civil liability for a tort, *Yancey v. Maestri*, La. App. 155 So. 509, it does not follow that disordered reason will exonerate a lawyer from the consequences of his professional misconduct. One of the qualities requisite for admission to the bar is that the applicant be of good moral character. When a lawyer has committed peculations, forgeries and breaches of trust, he violates the oath he has taken to demean himself honestly in his practice and the good character he possessed no longer exists. And it will not do for respondent to say that he was suffering from a mental aberration or amnesia depriving him of the ability to distinguish between right and wrong. In disbarment, unlike criminal prosecution or a civil suit for recovery of money based on an offense or quasi offense, consideration of the interest and safety of the public is of the utmost importance for,whereas it may not be humane to punish by confinement to prison one who labored under the inability to understand the nature of his wrongful acts, it is quite another matter to permit such a person to continue as an officer of the court and to pursue the privilege of engaging in the honorable profession of counsellor-at-law, when he, by his misconduct, has exhibited a lack of integrity and common honesty. And in our opinion it matters not whether the dishonest conduct stems from an incapacity

to discern between right and wrong or was engendered by a specific criminal intent.

The Supreme Court of Illinois in Re Patlak, 1938, 368 Ill.547, 15 N. E. (2d) 309, 312, 116 A. L. R. 627, had occasion to consider insanity as a defense to disbarment. In denying the plea, the Court sagaciously observed:

"While insanity proved is a defense to a criminal charge, yet a disbarment proceeding is for more than the single purpose of punishment. There is also the even more important purpose of protecting the public from unscrupulous and dishonest lawyers. Though a man be shown to be insane, the public have a right to protection against his activities in the practice of law, particularly when the symptoms of his insanity include a penchant for keeping the money of others, without rendering services or account therefor".

See also annotation 116 A. L. R. 632 and cases there cited.

The fith exception of respondent is that of prescription, laches and estoppel. It is asserted that, since the acts complained of occurred more than 17 years ago, the offense is so stale that it would be inequitable and unjust to permit the prosecution of the proceeding and, further, that respondent would be highly prejudiced in defending the suit after the passing of such a great length of time.

The exception cannot be sustained. Our law of prescription is purely statutory and the fact that a long time has elapsed between the commission of the acts and the bringing of the charges does not, of itself, provide a

just ground for dismising the suit. Indeed, it appears that respondent was confined to an insane asylum for several years and that he was under a judgment of interdiction from June 1941 until May 7, 1948, during which time the committee was unable to act. If respondent has been prejudiced by the delay, this is a matter which can be shown on the merits of the case.

The suggestion that the Association is estopped by its conduct in certifying respondent as a member in good standing, for 11 years following 1941, is not well taken for the reason that all persons licensed to practice law in this State are considered, upon the payment of annual dues, to be active members in good standing of the Association until they have been disbarred or suspended.

The last exception is actually a motion to strike paragraphs VII and VIII from the petition on the ground that they contain mere conclusions of the pleader and do not exhibit a fair and full disclosure of respondent's defense as established at the hearing. The allegations complained of are that respondent acknowledged a forgery of the signatures of Olga Wexler and Alys Senn and that he admitted that he had used the proceeds of the check delivered to him by Mrs. Forsyth, in payment of the spurious mortgage note, for "high living". We see nothing objectionable in these averments and know of no good reason why they should be expunged. They are not conclusions of the pleader, as counsel contends; they are allegations of fact which can be readily admitted or denied in an answer, as the case may be.

The exceptions of respondent are overruled, and he is given ten days from the date of this decree to file his answer to petition for disbarment.

EXHIBIT "C"

Doll v. Meyer, 214 La. 444, 38 So. (2d) 69.

State ex rel. *Lucas v. Hickey*, 214 La. 711, 38 So. (2d) 395.

Doll v. Dearie, et al., (Orleans Court of Appeal), 37 So. (2d) 61.

Doll v. Dearie, et al., (Orleans Court of Appeal), 37 So. (2d) 608.

Bonnelucq v. Bernard (Orleans Court of Appeal), 39 So. (2d) 447.

Doll v. Dearie, et al., (Orleans Court of Appeal), 39 So. (2d) 64.

Fried v. Edmiston (Orleans Court of Appeal), 40 So. (2d) 489.

Mc Daniels v. Doll (Orleans Court of Appeal), 40 So. (2d) 530.

Bonnelucq v. Bernard (Orleans Court of Appeal), 41 So. (2d) 88.

Doll v. Dearie (Orleans Court of Appeal), 41 So. (2d) 84.

Doll v. Sewerage & Water Board of New Orleans (Orleans Court of Appeal), 43 So. (2d) 271.

State, ex rel. *Doll v. Hickey, Recorder of Mortgages* (Orleans Court of Appeal), 43 So. (2d) 158.

State, ex rel. *Warren Realty Co., Inc. v. Montgomery, State Tax Collector* (Orleans Court of Appeal), 43 So. (2d) 33.

Doll v. R. P. Farnsworth & Co., Inc. (Orleans Court of Appeal), 49 So. (2d) 354.

Fried v. Edmiston, 218 La. 522, 50 So. (2d) 19.

Hardie v. Allen, et al., (Orleans Court of Appeal), 50 So. (2d) 74.

Cresap v. Kilpatrick (Orleans Court of Appeal), 51 So. (2d) 130.

Cohen v. Grace, 219 La. 91, 52 So. (2d) 297.

Mayerhefer v. Louisiana Coca Cola Bottling Co., Ltd., 219 La. 320, 52 So. (2d) 866.

Alpaugh v. Kragcer (Orleans Court of Appeal). 54 So. (2d) 233.

Doll v. R. P. Farnsworth & Co. (Orleans Court of Appeal), 55 So. (2d) 604.

Brewer v. Cowan, 220 La. 189, 56 So. (2d) 149.

Alpaugh v. Kragcer (Orleans Court of Appeal), 57 So. (2d) 700.

Doll v. Untz (Orleans Court of Appeal), 57 So. (2d) 55.

Doll v. Montgomery (Orleans Court of Appeal), 58 So. (2d) 573.

Levenson v. Chancellor, et al., (Orleans Court of Appeal), 58 So. (2d) 839.

Doll v. City of New Orleans, 221 La. 446, 59 So. (2d) 449.

Fox v. Doll, 221 La. 427, 59 So. (2d) 443.

Doll v. Montgomery (on rehearing), (Orleans Court of Appeal), 60 So. (2d) 907.

Housing Authority v. Doll, 222 La. 933, 64 So. (2d) 224.

State, ex rel. *Warren Realty Co., Inc. v. City of New Orleans*, 223 La. 719, 66 So. (2d) 785.

Doll v. Mc Morries (Orleans Court of Appeal), 67 So. (2d) 750.

Levenson v. Chancellor (Orleans Court of Appeal), 68 So. (2d) 116.

Housing Authority of New Orleans v. Doll, 69 So. (2d) 522.

City of New Orleans v. Doll,——La.,——, 71 So. (2d) 562.

State, ex rel. *Warren Realty Co. v. City of New Orleans* (Orleans Court of Appeal), 71 So. (2d) 579 (writ of review granted by Louisiana Supreme Court).

Succession of Saxton (Orleans Court of Appeal), 72 So. (2d) 344.